Ong Ka Kim v Wong Sing Kiong & Ors

HIGH COURT (SIBU) — PETITION NO 20-26-1 OF 1996
TEE AH SING J
15 APRIL 1997

Succession *— Letters of administration — Jurisdiction to grant — Whether High Court in Sarawak has jurisdiction to grant letters of administration — Whether only probate officers have jurisdiction to grant letters of administration — Whether O 71 Rules of the High Court 1980 applicable to Sarawak — Administration of Estates Ordinance (Sarawak Cap 80) s 3(a) — Rules of the High Court 1980 O 71 rr 2, 5 & 5A*

This was a petition for the grant of letters of administration ('the LA') of the estate of one Teh Siew Ing ('the deceased') who died intestate. The petitioner, the deceased widower, brought this petition under O 71 r 5 of the Rules of the High Court 1980 ('the RHC'). The respondent raised a preliminary objection that the application for the LA was procedurally wrong since O 71 as a whole was not applicable to Sarawak because the Probate and Administration Act 1959 mentioned in O 71 was only applicable to West Malaysia and had not been extended to Sarawak. The respondent argued that the application for the LA should have been made to the probate officer by virtue of s 3(a) of the Administration of Estates Ordinance (Sarawak Cap 80) ('the Ordinance') which was applicable to Sarawak. The petitioner stated that he had made the necessary application to the probate officer but the probate officer had refused to grant the LA solely to the petitioner. The petitioner argued further that the Ordinance was silent on the procedure in cases where the probate officer refused to grant the LA and therefore such loopholes had to be filled by resort to the RHC. The petitioner further argued that O 1 r 5A of the RHC could be applied to O 71 r 2 to substitute the Ordinance for the Probate and Administration Act 1959, thus allowing for the application of O 71 to Sarawak.

Held, dismissing the petition and allowing the preliminary objection:

(1) In O 71 r 2 of the RHC, 'Act' means the Probate and Administration Act 1959, which is only in force in West Malaysia. Under the Act, the jurisdiction to grant probate and letters of administration are vested in the High Court in Malaya. However, the Act has not been extended to Sarawak. Therefore, the law applicable in Sarawak is not the Probate and Administration Act 1959 but the Administration of Estates Ordinance (see p 54C–D).

(2) It is clear from ss 2, 3, 8, 9, 11 and 15 of the Ordinance that in Sarawak, the jurisdiction to grant probate and letters of administration is given to the probate officer. If there had been an intention in the legislature that the High Court should have any concurrent or supporting original jurisdiction with the probate officer, then there would have been some reference in the Ordinance. Thus, having regard to the tenor and provision of the

Ordinance, there was no concurrent jurisdiction vested in the High Court to grant probate and the LA.

Moreover, s 16(a) of the Courts of Judicature Act 1964 provides that rules of court could be made in respect of matters in which the High Court has jurisdiction. Thus, O 71 of the RHC was properly made in respect of the Probate and Administration Act 1959. The Rules Committee, however, is not given power to make rules regulating the practice of the probate officer in Sarawak. Under s 34 of the Ordinance, the chief secretary with the approval of the Governor-in-Council may make rules to carry the Ordinance into effect. Therefore, only rules made by the chief secretary with the approval of the Governor-in-Council would have legal force in Sarawak (see p 55E–F, I and 56B–C).

(3) Since the Ordinance does not confer jurisdiction to the High Court in Sarawak to grant probate and letters of administration, O 71 of the RHC has no application to Sarawak. Consequently, O 1 r 5A of the RHC could not be applied to O 71 r 2 to substitute the Ordinance for the Probate and Administration Act 1959.

Therefore, the petition for the grant of the LA filed in the High Court of Sibu was wrongly instituted since the High Court, as distinct from the probate officer, has no jurisdiction to grant probate and the LA (see p 56D, G–H).

[Bahasa Malaysia summary

Ini adalah satu petisyen memohon surat kuasa mentadbir ('surat kuasa tersebut') harta pusaka seorang bernama Teh Siew Ing ('si mati') yang mati tak berwasiat. Pempetisyen, duda si mati, telah membuat petisyen ini di bawah A 71 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Penentang telah membangkitkan bantahan permulaan bahawa permohonan untuk surat kuasa tersebut adalah salah dari segi prosedur kerana A 71 secara keseluruhannya tidak terpakai di Sarawak kerana Akta Probet dan Pentadbiran 1959 yang disebutkan di dalam A 71 adalah hanya terpakai di Semenanjung Malaysia dan telah tidak dilanjutkan ke Sarawak. Penentang telah berhujah bahawa permohonan untuk surat kuasa tersebut sepatutnya dibuat kepada pegawai probet memandangkan s 3(a) Ordinan Pentadbiran Harta Pusaka (Sarawak Bab 80) ('Ordinan tersebut') yang terpakai di Sarawak. Pempetisyen mengatakan bahawa dia telahpun membuat permohonan yang diperlukan itu kepada pegawai probet tetapi pegawai probet tersebut telah enggan memberikan surat kuasa tersebut hanya kepada pempetisyen. Pempetisyen telah berhujah selanjutnya bahawa Ordinan tersebut tidak menyebut mengenai prosedur dalam kes-kes di mana pegawai probet enggan memberikan surat kuasa tersebut dan maka dengan itu kekosongan tersebut haruslah dipenuhi dengan pemakaian KMT. Pempetisyen selanjutnya berhujah bahawa A 1 k 5A KMT boleh dipakai kepada A 71 k 2 untuk menggantikan Ordinan tersebut dengan Akta Probet

dan Pentadbiran 1959, dengan itu membenarkan pemakaian A 71 kepada Sarawak. A

Diputuskan, menolak petisyen dan membenarkan bantahan permulaan:

(1) Di dalam A 71 k 2 KMT, 'Akta' bermaksud Akta Probet dan Pentadbiran 1959, yang hanya berkuatkuasa di Semenanjung Malaysia. Di bawah Akta tersebut, bidang kuasa untuk memberi probet dan surat kuasa mentadbir adalah terletak pada Mahkamah Tinggi Malaya. Walau bagaimanapun, Akta tersebut tidak dilanjutkan ke Sarawak. Oleh itu, undang-undang yang terpakai di Sarawak bukanlah Akta Probet dan Pentadbiran 1959 tetapi Ordinan Pentadbiran Harta Pusaka (lihat ms 54C–D). B C

(2) Adalah jelas dari ss 2, 3, 8, 9, 11 dan 15 Ordinan tersebut bahawa di Sarawak, bidang kuasa untuk memberi probet dan surat kuasa mentadbir terletak pada pegawai probet. Jika terdapat niat badan perundangan bahawa Mahkamah Tinggi harus mempunyai bidang kuasa asal bersama ataupun menyokong dengan pegawai probet, maka akan terdapat rujukan dalam Ordinan tersebut. Oleh itu, mengambil kira maksud dan peruntukan Ordinan tersebut, tiada bidang kuasa bersama yang diletak pada Mahkamah Tinggi untuk memberikan probet dan surat kuasa tersebut. D E

Tambahan lagi, s 16(a) Akta Mahkamah Kehakiman 1964 memperuntukkan bahawa kaedah-kaedah mahkamah boleh dibuat berkaitan dengan perkara-perkara di mana Mahkamah Tinggi mempunyai bidang kuasa. Oleh itu, A 71 KMT telah sewajarnya dibuat berkaitan dengan Akta Probet dan Pentadbiran 1959. Jawatankuasa Kaedah, bagaimanapun, tidak diberi kuasa untuk membuat kaedah-kaedah mengawal amalan pegawai probet di Sarawak. Di bawah s 34 Ordinan tersebut, ketua setiausaha dengan kebenaran Gabenor-dalam-Majlis boleh membuat kaedah-kaedah untuk menguatkuasakan Ordinan tersebut. Oleh itu, hanya kaedah-kaedah yang dibuat oleh ketua setiausaha dengan kebenaran Gabenor-dalam-Majlis akan mempunyai kuatkuasa undang-undang di Sarawak (lihat ms 55E–F, I dan 56B–C). F G

(3) Oleh kerana Ordinan tersebut tidak mengurniakan bidang kuasa kepada Mahkamah Tinggi Sarawak untuk memberikan probet dan surat kuasa mentadbir, A 71 KMT tidak terpakai di Sarawak. Ekoran daripada itu, A 1 k 5A KMT tidak terpakai kepada A 71 k 2 untuk menggantikan Ordinan tersebut dengan Akta Probet dan Pentadbiran 1959. H

Oleh itu, petisyen untuk pemberian surat kuasa tersebut telah dimulakan secara salah kerana Mahkamah Tinggi, berbeza dengan pegawai probet, tidak mempunyai bidang kuasa untuk memberikan probet dan surat kuasa tersebut (lihat ms 56D, G–H).] I

Notes

For cases on letters of administration, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1902–1963.

Cases referred to

Chew Siew Khim, Re [1964] MLJ 412 (refd)
Husli bin Mok & Ors v Probate Officer, Miri [1996] 5 MLJ 420 (refd)
Yap Kee Par v Molly Yap & Ors [1996] 4 MLJ 219 (refd)

Legislation referred to

Administration of Estates Ordinance (Sarawak Cap 80) ss 2, 3, 3(a) 8, 8(a), 9, 11, 15, 34
Courts of Judicature Act 1964 s 16(a)
Distribution Act 1958 s 6
Probate and Administration Act 1959
Rules of the High Court 1980 O 1 r 2(1), O 1 r 5A, O 71 rr 2, 2(1), 3, 5

Wong Sing Nang (*Wong Orlando Chua & Co*) for the petitioner.
Chambai Lindong (*SB Lee & SK Ling*) for the respondents.

Cur Adv Vult

Tee Ah Sing J: This is a petition for the grant of letters of administration ('the LA') of the estate of Teh Siew Ing who died intestate — by Ong Ka Kim, the petitioner — to the High Court under O 71 r 5 of the Rules of the High Court 1980 ('the RHC').

The application is supported by the affidavit of the petitioner. The relevant parts read as follows:

1 I am the husband and lawful widower of the late Teh Siew Ing who passed away intestate on 12 May 1995 at 5.52pm at Sibu General Hospital ('the deceased').

2 My late wife who was a Malaysian citizen had during her lifetime acquired the following eight parcels landed properties particularized as follows:

(i) one third undivided right title share and interest in that parcel of land situate at Bukit Samak, Rantau Panjang, Sibu, containing an area of 3.675 hectares, more or less and described as Lot 2317 Seduan land district;

(ii) one third undivided right title share and interest in that parcel of land situate at Rantau Panjang, Igan, Sibu, containing an area of 1.5176 hectares, more or less and described as Lot 2311 Seduan land district;

(iii) one third undivided right title share and interest in that parcel of land situate at Telok Kibong, Sibu, containing an area of 2.987 hectares, more or less and described as Lot 1224 Seduan land district;

(iv) all that parcel of land situate at Bukit Samak, Rantau Panjang, Sibu, containing an area of 3.776 hectares, more or less and described as Lot 2316 Seduan land district;

(v) all that parcel of land situate at Rantau Panjang, Igan, Sibu, containing an area of 2.756 hectares, more or less and described as Lot 2310 Seduan land district;

(vi) all that parcel of land situate at Rantau Panjang, Sibu, containing an area of 8.458 hectares, more or less and described as Lot 3695 Seduan land district;

(vii) all that parcel of land situate at Kuala Matu, Matu, containing an area of 3.120 hectares, more or less and described as Lot 459 Block 5 Jemoreng land district;

(viii) all that parcel of land together with the building thereon and appurtenances thereof situate at Laichee Lane, Sibu, containing an area of 208.8 square metres, more or less and described as Lot 1094 Block 7 Sibu town district

('the properties'). Copies of land titles as annexed and marked B1, B2, B3, B4, B5, B6, B7 and B8 respectively.

3 My late wife had also deposited a total sum of Ringgit Malaysia one hundred and seven thousand three hundred and five and Sen eighty one (RM107,305.81) only with EON Finance Bhd and MBf Finance Bhd, particulars of which are as follows:

No	Description	Amount (RM)
1	MBf Finance Bhd F/D No 7279725	14,187.29
2	MBf Finance Bhd F/D No 7371296	17,485.65
3	MBf Finance Bhd F/D No 7933680	5,416.97
4	EON Finance Bhd F/D No 356652	12,322.93
5	EON Finance Bhd F/D No 330963	2,055.10
6	EON Finance Bhd F/D No 381924	28,474.21
7	EON Finance Bhd F/D No 381345	2,637.19
8	EON Finance Bhd F/D No 295182	24,726.47
	Total:	107,305.81

('the cash'). Copies of certificates are annexed and marked C1, C2, C3, C4, C5, C6, C7 and C8 respectively.

4 My late wife was also the shareholder of a company with particulars as follows:

No	Name	No of Shares
1	Hong Lian Ice Factory (1976) Sdn Bhd — Certificate No 53	200
	Hong Lian Ice Factory (1976) Sdn Bhd — Certificate No 23	2,000

('the shares') together with copies of share certificates marked as D1 and D2 respectively.

5 I have seven sons and two daughters particulars of whom are as follows:

No	Name	IC No	Age	Relationship with Deceased
1	Wong Sia Sing	K 127245	47	Son
2	Wong Sing Kiong	K 135208	45	Son
3	Wong Sing Ai (f)	No 520210–13–5122	43	Daughter

4	Wong Sing Chiu (f)	No 530110–13–5378	42	Daughter
5	Ong Sing Hing	K 732889	35	Son
6	Wong Sing Kuok	K 818472	33	Son
7	Ong Sing Long	K 0035451	31	Son
8	Ong Sing Hiing	K 0174305	27	Son
9	Wong Sing Chung	K 660463	39	Son

6 I am advised by my solicitors, Wong Orlando Chua & Co that as a lawful widower, I am wholly and beneficially entitled to the estate of my late wife. However, I am willing to distribute the estate among all my said children in the manner stated in an agreement, marked as 'E', if they sign the letter of consent that the letters of administration be granted to me.

7 However, Wong Sing Kiong, Wong Sing Kuok and Wong Sing Chiu ('the three children') refused and continued to refuse to sign the agreement and the letter of consent annexed herewith and marked as 'F'.

8 I then instructed Wong Orlando Chua & Co to write to the Probate Officer, Sibu, to seek their assistance to persuade the three children to sign the said letter of consent and the agreement. A copy of the letter is annexed herewith and marked as 'G'.

9 On 28 November 1995, my solicitors wrote a letter informing the three children that the probate officer in Sibu, had made an arrangement to see them in the probate office in Sibu, in the morning of 4 December 1995 to advise them to sign the letter of consent and the agreement. Annexed herewith a copy of the letter and marked as 'H'. The three children were present on the said day but they refused to sign them. Without their signatures, the probate officer would not issue the letters of administration to me.

10 I am advised by my solicitors, Wong Orlando Chua & Co that notwithstanding the refusal of the three children to sign the letter of consent and the agreement, the letters of administration can still be granted solely to me on three grounds listed below:

(a) I, as a lawful widower of the deceased, am wholly and beneficially entitled to the deceased's estate pursuant to s 6 of the Distribution Act 1958;

(b) there is no minor or life interest in the estate of deceased;

(c) by rule of priority pursuant to s 8 of the Administration of Estates Ordinance (Sarawak Cap 80), I am at the top of priority and I need not obtain consent from any of my children.

11 I then again instructed my solicitors to inform the probate officer in Sibu, to request him to grant the letters of administration solely to me within 14 days on the said grounds (notwithstanding the refusal of the three children to sign the letter of consent and the agreement), failing which I would make a formal application by way of petition to the High Court. A copy of the said letter is annexed herewith and marked as 'I'.

12 Till today, after the lapse of 14 days, the probate officer in Sibu, has yet to grant the letters of administration to me.

An affidavit was affirmed by the first, second and third respondents on 9 September 1996 opposing the petition. The relevant parts read as follows:

1 We are three of nine lawful children of the petitioner, Ong Ka Kim and our late mother, Teh Siew Ing. The matters deposed to herein are within our personal knowledge, information and belief unless otherwise stated.

2 Our father, the petitioner, has applied to the District Office and the High Court in Sabah and Sarawak at Sibu for the grant or order for the grant of the letters of administration in respect of our late mother's estate.

3 The Probate Officer, District Office, Sibu has refused to grant the letters of administration solely to our father.

4 The three of us have objected to the grant of letters of administration solely to our father based on the following reasons:
(a) our father is in an advanced age of 71 and is rather susceptible to external undue influence;
(b) our father has, within less than two weeks of the demise of our late mother on 12 May 1995, begun cohabiting with a much younger woman by the name of Chan Siok Boi (BIC K 586730) who is 41 and some 30 years younger than our father and young enough to be our sister. She is even younger than two of us by several years;
(c) it is our firm and reliable belief that this young woman, Chan Siok Boi, is able to exert undue influence on my senile father and is only interested in wheedling money or assets out of our father or mother's estate;
(d) our father has not warranted that once certain properties or cash of our mother pass to him, he would not transfer them in his lifetime to any other person(s) other than his own children;
(e) we hold grave fears that once the properties and cash are transferred to our father, the above-mentioned woman would wheedle them out of our father and then desert him.

5 We believe firmly that our father is not fit or competent to act alone in respect of the letters of administration, despite s 8 of the Administration of Estates Ordinance (Sarawak Cap 80).

6 Two of us, Wong Sing Kiong and Wong Sing Kuok have for 20 over years toiled for our father and mother in their business with hardly any rewards. Our father, the petitioner, has threatened to cut some of us off from our rightful share in our mother's estate despite any purported agreement as alleged by the petitioner and marked 'E' in his petition.

7 In the premises, we the respondents pray that no order be granted solely to our father and that one of us, Wong Sing Kiong be granted jointly in conjunction with our father the letters of administration in respect of our mother's estate that has to be safeguarded.

Learned counsel for the respondents raised a preliminary objection that the application for the LA was procedurally wrong. The application was made under O 71 r 5 of the RHC. Order 71 as a whole is not applicable to Sarawak because the Probate and Administration Act 1959 mentioned in O 71 is only applicable to West Malaysia and has not been extended to Sarawak. In Sarawak, the law relating to probate and administration matters is contained in the Administration of Estates Ordinance (Sarawak Cap 80) ('the Ordinance'). In Sarawak, the application for LA should be made to the probate officer under s 3(a) of the Ordinance. The petitioner had made the necessary application but the probate officer had refused to grant the LA solely to the petitioner. This is stated in para 3 of the affidavit opposing the respondent's application.

Under s 9(1) of the Ordinance, the probate officer is entitled to refuse any application for the grant of the LA to any person. As the probate officer had refused to grant the LA to the petitioner, the petitioner's remedy should be by way of an application for certiorari and mandamus against the probate officer. In support, he cited the cases of *Re Chew Siew Khim* [1964] MLJ 412 and *Husli bin Mok & Ors v Probate Officer, Miri* [1996] 5 MLJ 420. He submitted that the court had no jurisdiction to entertain the petition.

Learned counsel for the petitioner submitted that there was no letter from the probate officer which indicated that he had refused the application. So far as the probate officer was concerned, if any one of the deceased's son or daughter refused or declined to sign the letter of consent, the whole matter would be left there.

In para 11 of the petitioner's affidavit, the petitioner requested the probate officer to grant the LA solely to the petitioner but the probate officer did not reply. In the circumstances, there was no other alternative to enable the petitioner to have the LA granted to him. The Ordinance is silent on the procedure on how the deceased's family could apply for the LA if the probate officer had refused to grant the same. The loophole in the Ordinance therefore had to be filled by resort to the RHC.

Learned counsel for the petitioner submitted that the High Court in Sarawak had the jurisdiction to grant LA on the following grounds:

(1) Order 1 r 2(1) of the RHC which states that 'all rules shall have effect in relation to all proceedings in the High Court ...' . Therefore, the RHC is applicable to all proceedings of the High Court throughout Malaysia unless expressly stated.

(2) Order 1 r 5A of the RHC which states that 'where references are made ... to any provisions in the Acts, Ordinances or Enactments or other written laws in force in Malaya, there shall be substituted therefor references to corresponding Acts, Ordinances or Enactments or other written laws in force in Sarawak and Sabah ...'.

Order 71 r 2 of the RHC refers to the Probate and Administration Act 1959. It ought to be substituted by the Administration of Estates Ordinance (Sarawak Cap 80).

(3) Order 71 r 3 of the RHC enables a personal applicant to apply to the High Court.

He also submitted that the petitioner was the most suitable person to apply. By virtue of s 8(a) of the Ordinance, the petitioner is at the top of priorities as he is the deceased's widower and is of full age and sound mind. By virtue of s 6 of the Distribution Act 1958, the petitioner was the best suited person as he was beneficially and wholly entitled to the estate of the deceased. In support, he cited the case of *Yap Kee Par v Molly Yap & Ors* [1996] 4 MLJ 219. The male heirs of the deceased under s 8(a) of the Ordinance are only entitled if the petitioner renounces his right (see O 71 r 24 of the RHC).

He submitted that the issue of certiorari does not arise as the probate officer never made any decision.

In reply, learned counsel for the respondents submitted that if what learned counsel for the petitioner submitted is correct — that there was no refusal by the probate officer to issue the LA solely to the petitioner — then what the petitioner should have done was to compel the probate officer to issue the LA to him by way of application for mandamus. A

Order 71 r 1 of the RHC provides that 'these rules apply to non-contentious probate proceedings subject to the following rules of this Order'. B

In O 71 r 2 of the RHC, 'Act' means the Probate and Administration Act 1959 ('the Act').

The Act is only in force in West Malaysia. The preamble to the Act states that it is an Act relating to probate and letters of administration. Under the Act, the jurisdiction to grant probate and letters of administration is vested in the High Court in Malaya. However, the Act has not been extended to Sarawak. Therefore, the Act has no application in Sarawak. However, in Sarawak, the law applicable is the Administration of Estates Ordinance (Sarawak Cap 80) ('the Ordinance'). C D

In s 2 of the Ordinance, 'probate officer' means:

(a) in Kuching, in respect of Malay and Dayak estates, the district officer and in respect of all other estates, the Registrar-General;

(b) elsewhere, the officer-in-charge of the district. E

Section 3 of the Ordinance defines the jurisdiction of the probate officer as follows:

> 3 The probate officer may:
> (a) issue probate and letters of administration of the estates of deceased persons leaving assets within his district; F
> (b) at his discretion take possession of and administer any asset within his district belonging to a deceased person in the event of there being no person competent or willing to administer the same; and
> (c) at his discretion administer any estate which appears to be insolvent.

Section 8 of the Ordinance sets out the persons entitled to letters of administration in order of priority as follows: G

> 8 The following persons, if of full age and of sound mind, are entitled in the order stated to letters of administration to a deceased person's estate:
> (a) the deceased's widower;
> (b) the male heirs of the deceased; H
> (c) the deceased's father;
> (d) the brother or brothers of the whole blood of the deceased;
> (e) the deceased's widow (or primary widow if more than one);
> (f) the deceased's nearest male relative;
> (g) the deceased's nearest female relative; and
> (h) any creditor of the deceased, who shall enter into a bond for such amount and with such sureties, or has furnished such security, as the probate officer shall require. I

Section 9 of the Ordinance reads as follows:

A 9 (1) If, in the opinion of the probate officer, the person or persons entitled to probate or letters of administration is or are unfit to act, he may issue the grant to the person or persons next entitled, or to any suitable person or persons who may be willing to act.

(2) The probate officer may in his discretion require any person, besides a creditor of the deceased, applying for probate or letters of
B administration to enter into a bond or to furnish security as in the case of a creditor.

Under s 9(1) of the Ordinance, a probate officer has a very wide discretion to grant probate or letters of administration to any suitable person who may be willing to act if he thought that the person entitled to act under s 8
C was unfit to act.

Section 11 of the Ordinance provides that 'an application for probate or letters of administration shall be made in person to the probate officer'.

Section 15 of the Ordinance reads as follows:

15 The issue by a probate officer of probate or letters of administration
D shall vest in the executor or administrator named therein, and if more than one, jointly, for the purpose of administration, all the property, estate and effects of the deceased set out in the list annexed to the grant and all property exempted under sub-s (1) of s 4.

I am of the view that it is abundantly clear from ss 2, 3, 8, 9, 11 and 15 of
E the Ordinance that in Sarawak, the jurisdiction to grant probate and letters of administration is given to the probate officer.

It would seem to me that if there had been an intention in the legislature that the High Court should have any concurrent or supporting original jurisdiction with the probate officer, one would surely have expected
F to have found some reference in the Ordinance.

I have come to the conclusion — having regard to the tenor and provision of the Ordinance — that there is no concurrent jurisdiction vested in the High Court to grant probate and the LA.

Reference was made to O 1 r 5A and O 71 of the RHC by learned
G counsel for the petitioner.

Order 1 r 5A of the RHC reads as follows:

5A Where references are made under these rules to any provisions in the Acts, Ordinances or Enactments or other written laws in force in Malaya, there shall be substituted therefor references to the
H corresponding Acts, Ordinances or Enactments or other written laws in force in Sarawak or Sabah, as the case may be.

Section 16(a) of the Courts of Judicature Act 1964 reads as follows:

16 Rules of court may be made for the following purposes:

(a) for regulating and prescribing the procedure (including the method
I of pleading) and the practice to be followed in the High Court, the Court of Appeal and the Federal Court in all causes and matters whatsoever in or with respect to which *those courts have for the time being, jurisdiction* (including the procedure and practice to be followed in the registries of those courts), and any matters incidental

> to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court, to the Court of Appeal or the Federal Court shall be made. (Emphasis added.)

So it is clear from this that rules of court can be made in respect of matters in which the High Court has jurisdiction. So, O 71 of the RHC was properly made in respect of the Probate and Administration Act 1959. The Rules Committee is not given power to make rules regulating the practice of the probate officer. However, under s 34 of the Ordinance, 'the chief secretary with the approval of the Governor-in-Council may, by notification in the Government *Gazette*, make rules to carry this Ordinance into effect'. Therefore, only rules made by the chief secretary with the approval of the Governor-in-Council have legal force in Sarawak.

As I have stated earlier, the Ordinance does not confer jurisdiction to the High Court in Sarawak to grant probate and LA. As such, O 71 of the RHC has no application to Sarawak. Consequently, O 1 r 5A of the RHC cannot be applied to O 71 r 2 of the RHC to substitute the Ordinance for the Probate and Administration Act 1959.

Since the petitioner has made an application to the probate officer in Sibu for the grant of the LA to him, if the probate officer has refused to grant the LA to him, then he may file an application for certiorari to the High Court in accordance with the RHC. On the other hand, if — as submitted by learned counsel — there was no refusal by the probate officer to issue the LA solely to the petitioner, the petitioner may make an application for mandamus.

In *Re Chew Siew Khim* [1964] MLJ 412, His Lordship McGilligan J said:

> In *Foo Sam Tek v Probate Officer, Simanggang* [1960–63] SCR 17, there is a decision by the Court of Appeal of Sarawak, North Borneo and Brunei, given on 29 August 1960, that (I quote from the judgment of the Chief Justice, Sir John Ainley) 'in a proper case, certiorari would lie to remove to the High Court the proceedings of a probate officer'.

In conclusion, I am of the view that the petition for the grant of the LA filed in the High Court Sibu was wrongly instituted in the High Court since the High Court, as distinct from the probate officer, has no jurisdiction to grant probate and the LA.

I therefore uphold the preliminary objection and dismiss the petition with costs.

Petition dismissed, preliminary objection allowed.

Reported by Zahid Taib